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IN THE

Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari.[1] Tax Executives Institute (hereinafter

[1] Pursuant to Rule 37.6, *amicus* Tax Executives Institute, Inc. states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for both parties received timely notice of the intent to file an *amicus* brief under this rule and both parties have consented to its submission in letters filed with the Clerk.

"TEI" or "the Institute") is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. TEI was organized in 1944 under the laws of the State of New York and is exempt from taxation under section 501(c)(6) of the Internal Revenue Code (26 U.S.C.). The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws, reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and vindicating the Commerce Clause and other constitutional rights of business taxpayers. Among the standards of professional conduct that all TEI members subscribe to is the following:

> [The member] will present the facts required in tax returns and all the facts pertinent to the resolution of questions at issue with representatives of the government imposing the tax.[2]

TEI has approximately 7,000 members who represent more than 3,000 of the leading corporations in the United States, Canada, Europe, and Asia. TEI members have a vital interest in the resolution of the work-product privilege issue in this case. Substantially all TEI members are employed by corporations that are subject to federal securities and tax laws, compliance with which requires the preparation of tax accrual workpapers or similar documents; most work for companies that, because of their size and complexity, are under continuous audit by the Internal Revenue Service (IRS). Consequently, TEI members or their coworkers are almost without exception involved in the preparation or review of tax

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[2] *See* http://www.tei.org/Resource.phx/public/standards.htx.

accrual workpapers. As such, a decision by this Court whether to hear this case and resolve interpretative questions about the scope of the work product privilege will directly affect TEI members and the companies by whom they are employed. Accordingly, the Institute has a special interest in this matter.

ARGUMENT

I. BACKGROUND

In 2003, the IRS began an examination of the federal income tax returns of petitioner, Textron Inc., for the tax years 1998 to 2001. In connection with that examination, the IRS issued an administrative summons for petitioner's 2001 workpapers. Citing, among other things, the work-product privilege, Textron withheld certain documents, including a spreadsheet prepared by its lawyers listing items on its return that the IRS could potentially dispute and, as to each item, estimated the likelihood of success in the event of a dispute. The government filed a petition to enforce a summons for the documents in the U.S. District Court for the District of Rhode Island. The district court denied the petition. A panel of the U.S. Court of Appeals for the First Circuit initially affirmed. After granting rehearing *en banc*, the court of appeals reversed.

II. AN IRRECONCILABLE THREE-WAY SPLIT AMONG THE CIRCUIT COURTS MUDDLES THE APPLICATION OF THE WORK-PRODUCT PRIVILEGE, SPAWNING UNCERTAINTY AND UNDERMINING THE ATTORNEY-CLIENT RELATIONSHIP

This case concerns the scope of the work-product privilege codified in Rule 26(b)(3) of the Federal

Rules of Civil Procedure and, specifically, the meaning of the phrase "in anticipation of litigation" in applying the privilege. More fundamentally, it involves whether the IRS can properly gain access to the thoughts, mental impressions, opinions, and legal theories of a taxpayer's attorneys about the merits of positions taken on a tax return.

Pursuant to Rule 10, one of the considerations governing the review of petitions for writs of certiorari is whether the underlying case involves a conflict among the U.S. courts of appeals or whether it involves a decision of a U.S. court of appeals on an important question of federal law that has not been, but should be, settled by the Court. Such a conflict exists here in respect of the proper scope of the work-product privilege. While not every circuit conflict merits resolution by the Court, where the law is thrown into disarray—here, with the emergence of not two, but three, divergent and irreconcilable views—the matter becomes "ripe for the Supreme Court to intervene and set the circuits straight on [the] issue." (App. 45a (Torruella, J., with Lipez, J., dissenting).)[3] *Amicus* TEI respectfully submits that the Court should act to end the confusion surrounding the proper scope of Rule 26(b)(3) and thereby provide the certainty essential to vindicate the policy undergirding the work-product privilege.

The work-product privilege was first recognized by this Court in *Hickman v. Taylor*, 329 U.S. 495 (1947). There, in discovery, the plaintiff sought materials

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[3] The court below also recognized the conflict: "[T]here is some difference in the interpretations adopted in different circuits. . . ." Order Staying Mandate, *United States of America v. Textron Inc. and Subsidiaries*, September 16, 2009. (App. 120a.)

"secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen." The Court held that the "work product" of the lawyer, "written materials obtained or prepared by an adversary's counsel with an eye toward litigation," was protected from disclosure. The Court explained that "proper preparation of a client's case demands that he assemble information . . . prepare his legal theories and plan his strategy without undue and needless interference." *Id.* at 512. As Justice Jackson wrote in his concurring opinion, "[d]iscovery is hardly intended to enable a learned profession to perform its functions either without wits or with wits borrowed from the adversary." *Id.* at 516 (Jackson, J., concurring).

In 1970, the Federal Rules of Civil Procedure were amended to codify the work-product privilege. Rule 26(b)(3) provides that the work-product privilege covers "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative."

The work-product privilege is not absolute. Thus, where a party to litigation can show that it "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means," the party can obtain production of otherwise protected materials. Fed. R. Civ. P. 26(b)(3)(A)(ii). Even such a showing, however, will not entitle a party to obtain "opinion work-product," *i.e.*, materials that would "disclos[e] . . . the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B).

Thus, the work-product privilege must be applied in a manner that permits the attorney's analytical and strategic work to be done in private. Otherwise, its efficacy will be diminished. As the Court explained in *Hickman*, the privilege in respect of documents prepared "in anticipation of litigation" (as the term is used in Rule 26(b)(3)) is necessary because "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." 329 U.S. at 511.

Regrettably, the absence of guidance from this Court since its decision six decades ago in *Hickman* has muddled the contours of the work-product privilege. Thus, three different standards have been crafted and applied by the courts of appeals in interpreting the phrase "in anticipation of litigation." Eight circuits have embraced a "because of" standard, protecting from disclosure documents prepared because of the prospect of litigation. *See, e.g.*, *In Re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998); *United States v. Adlman*, 134 F.3d 1194, 1202-03 (2d Cir. 1998); *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993); *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006); *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.), *cert. denied*, 484 U.S. 917 (1987); *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004). A ninth court of appeals—the Fifth Circuit—employs a test that looks to whether the "primary motivating purpose" for which the document was prepared was to assist in litigation. *United States v. El Paso Co.*, 682 F.2d 530 (5th

Cir. 1982), *cert. denied*, 466 U.S. 944 (1984). And finally, the First Circuit in this case conjured up its own idiosyncratic standard that would permit the disclosure of documents except where they were "prepared for use in possible litigation." (App. at 11a.)

These three standards are incompatible with one another, and the resulting confusion robs parties to disputes (or potential disputes) of the protection intended by the work-product privilege. The situation calls out for intervention by this Court. Otherwise, attorneys and their clients will be unable to know with certainty which documents are "prepared in anticipation of litigation" and thus protected from disclosure. The uncertainty will impede candor between attorneys and their clients, and the divergent standards could even prompt litigants to forum shop, seeking to file lawsuits in the jurisdiction whose interpretation of Rule 26(b)(3) benefits them. Because the work-product privilege is essential to the proper functioning of the adversarial legal system, the Court should grant the writ of certiorari and hold that the "because of" standard applies in interpreting the "in anticipation of litigation" requirement of Rule 26(b)(3).

III. TAX ACCRUAL WORKPAPERS, THE DOCUMENTS AT ISSUE, CONTAIN THE MENTAL IMPRESSIONS, THEORIES, AND ASSESSMENTS THAT THE WORK-PRODUCT PRIVILEGE IS INTENDED TO PROTECT

A. The IRS's Summons Power Is Subject to the Work-Product Privilege

Section 7602 of the Internal Revenue Code authorizes the IRS to issue administrative summonses for

the production of "any books, papers, records, or other data which may be relevant or material" in "ascertaining the correctness of any return . . . , determining the liability of any person for any internal revenue tax . . . , or collecting any such liability. . . ." 26 U.S.C. § 7602(a). This Court has described section 7602 as a "broad summons authority" reflecting a "congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry." *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984) (emphasis added).

The obligations imposed by the tax summons, however, are not without limit. Rather, they are subject to the conditions of *United States v. Powell*, 370 U.S. 48 (1964),[4] and, as important, to "traditional privileges and limitations." *Upjohn Co. v. United States*, 449 U.S. 383, 399 (1981). Nothing in the language of the IRS summons provision or its legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine to materials summonsed by the IRS. *Id.*

B. Governmental Authorities Must Focus on Facts and not Thought Processes or Mental Impressions

Textron's dispute with the IRS centers on the correctness of its 2001 tax return, the evaluation of which requires the IRS to examine the facts and circumstances related to the transactions at issue

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[4] The Court granted certiorari in *Powell* "[b]ecause of the differing views in the circuits on the standards the Internal Revenue Service must meet to obtain judicial enforcement of its orders. . . ." 379 U.S. 50-51 (footnote omitted). As explained in the prior section, the same concern should prompt the Court's review in this case.

and to apply the pertinent tax law to those facts. Without question, those facts were readily available to the IRS by means of an examination of Textron's tax return and the agency's administrative fact-finding processes (including its ability to issue administrative summonses). Indeed, during the course of the examination, the IRS issued more than 500 formal requests for information, with Textron producing "many filing cabinets" worth of material in response to those requests. (App. 91a.)

Notwithstanding this voluminous production, the government sought more. It did not confine its requests to factual information relating to transactions; it sought access to Textron's tax accrual workpapers, which contain the company's theories, opinions, arguments, and speculations about its contingent tax liabilities, *i.e.*, the thought processes underlying the positions Textron reported on its tax return.

The opinions and conclusions of Textron's counsel and tax advisers, as embodied in the tax accrual workpapers, would provide the IRS with a "blueprint" (App. 20a) or "roadmap" into the company's own analysis of the strengths and weaknesses of its positions (including its negotiation and litigation strategy). As such, they are the very "mental impressions" that the Court in *Hickman* sought to protect from disclosure. 329 U.S. at 510. Further, those opinions do not directly bear on the determination of Textron's tax liability. The determination of any tax owed by Textron must be based on *factual* information—readily available from the tax return or through formal requests for information—not on opinions reflecting the thought processes of Textron's attorneys.

The First Circuit stated that "if a blueprint to Textron's possible improper deductions can be found in Textron's files, it is properly available to the government *unless* privileged." (App. 20a (emphasis in original).) That statement, however, is tautological because the question presented is whether the documents are, in fact, privileged. Noting that the petitioner in *Hickman* sought documents "to make sure he that he has overlooked nothing," 329 U.S. at 513, the Court held: "That is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of [opposing counsel's] professional activities." *Id.*[5]

C. Although Tax Accrual Workpapers Serve a "Dual Purpose," They Are Properly Subject to Work-Product Protection

It is beyond question that the documents at issue served two purposes: one, to assist Textron's auditors in determining the amount to be set aside in reserve for potential tax liabilities, and two, to guide Textron in making litigation or settlement decisions concerning the treatment of certain items. (App. 35a-36a.) Confoundingly, the First Circuit embraced the first (App. 12a), but ignored the second (App. 14a-15a). More important, the court disregarded the essential nature of the documents—*legal* analysis (*i.e.*, attorney work-product) of the issues relating to *both* purposes. In other words, it denied the complexity of

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[5] The court below dismissed Textron's concerns about giving the IRS a "blueprint" by stating that tax collection is not a game. (App. 20a.) That is indisputably true, but the integrity of the voluntary, self-assessment tax system is best preserved by enabling taxpayers to secure candid and complete legal advice.

the marketplace and interdependence of the applicable tax (legal) and financial regulatory regimes that necessitate the involvement of attorneys and access to the lawyer's "mental impressions, conclusions, or legal theories" in respect of the transactions reflected on the taxpayer's tax return.

Tax accrual workpapers represent a bridge between the tax and financial reporting worlds. Here, the documents at issue were prepared by Textron's attorneys because the company anticipated the possibility of litigation with the IRS regarding various items on its return. They reflected the opinions of Textron's attorneys about which items might be challenged by the IRS, their legal assessment of the hazards of litigating those issues, and their recommendation of the tax reserve amounts that should be accrued because of those hazards. The workpapers would not have been prepared "but for" the fact that Textron anticipated the possibility of litigation with the IRS.

Indeed, absent litigation, or the prospect of it, there would have been no reason for Textron to establish any reserve or to prepare the workpapers used to calculate the reserve. This is the case even though the workpapers assisted Textron in determining the amount to be reserved to cover any potential tax liabilities and were useful in obtaining an "unqualified" opinion from its auditors regarding the adequacy of reserves.

The presence of dual purpose documents in a case involving the work-product privilege does not present a new, unique, or insuperable analytical challenge. Such documents have been evaluated by courts since the Court's decision in *Hickman*. The applicability of the work-product privilege to dual purpose documents

in a tax case has been addressed in several cases, most notably *United States v. Adlman*, 134 F.3d 1294 (2d Cir. 1998), which the First Circuit has cited with approval. *See Maine v. United States Dep't of Interior*, 298 F.3d 60, 68 (1st Cir. 2002) ("In light of the decisions of the Supreme Court, we therefore agree with the formulation of the work-product rule adopted by *Adlman* and by five other courts of appeals.").

In *Adlman*, the Second Circuit considered whether the work-product privilege applied where a document in a tax case was created both in anticipating litigation and for a business purpose. In embracing the "because of" interpretation of Fed. R. Civ. P. 26(b)(3), the court rejected the "primary purpose" test extant in the Fifth Circuit, which only grants work-product immunity to workpapers prepared "primarily motivated to assist in future litigation over the return." *See United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982). The Second Circuit made clear, moreover, that the "because of" formulation is not limited to documents prepared *for use* in litigation:

> We believe that the requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and the policies of the Rule. Nowhere does Rule 26(b)(3) state that a document must have been prepared *to aid* in the conduct of litigation in order to constitute work product, much less *primarily or exclusively* to aid in litigation. Preparing a document "in anticipation of litigation" is sufficient. Nothing in the Rule states or suggests that documents prepared "in anticipation of litigation" with the purpose of assisting in the

> making of a business decision do not fall within this rule.

Adlman, 134 F.3d at 1198-99.

The Second Circuit's analysis of dual purpose documents for purposes of Rule 26(b)(3) is clearly correct. Textron's tax accrual workpapers by their very nature assessed matters implicated by the attorney-client privilege—the legal consequences associated with making certain business decisions (*e.g.*, entering into a transaction and reporting it on a tax return). They are unquestionably suffused with the mental impressions and opinions of Textron's attorneys and, hence, should be accorded the protection of the work-product privilege.

D. The First Circuit's Standard Would Subject to Discovery All Documents Assessing Ongoing or Potential Litigation Risks

Left standing, the First Circuit's exceptionally narrow interpretation of Rule 26(b)(3) would have far-reaching consequences beyond tax accrual workpapers and the establishment of financial reserves for tax contingencies. Specifically, its effect would extend to all litigation and allow parties in a broad range of litigation contexts—both public and private—to access documents reflecting lawyers' strategy or analysis of their clients' claims.

Stated differently, attorneys and clients engaged (or potentially engaged) in disputes involving, for example, environmental liability, products liability, or intellectual property, would be subject to the vagaries of the First Circuit's tortured construction of the work-product privilege. Every document prepared by counsel that assesses risks of ongoing or

potential litigation could well be subject to discovery because, under the First Circuit's standard, such documents could not be said to have been prepared "for use" in litigation. One could conclude under the interpretation of the First Circuit that no document prepared prior to the initiation of litigation would qualify for protection under the privilege, as prior to that initiation, there is no litigation in which to use the document.

In short, the standard propounded by the court below threatens to vitiate the work-product privilege, depriving clients of its protection in a broad range of cases with respect to a broad range of documents. It would allow the IRS, in the words employed by Justice Jackson in *Hickman*, "to perform its functions either without wits or on wits borrowed from the adversary." 329 U.S. at 516 (Jackson, J., concurring).

IV. RECENT LEGISLATIVE AND FINANCIAL REPORTING REQUIREMENTS MANDATING GREATER DISCLOSURE PROVIDE AN INDEPENDENT BASIS FOR PROTECTING THE DOCUMENTS AT ISSUE FROM DISCLOSURE

Two and a half decades ago, the Court reviewed a decision of the Second Circuit holding that accountant-prepared tax accrual workpapers were protected from disclosure under an analog of the work-product privilege, but declined to uphold the appeals court's decision that public policy requires that an IRS summons for such documents ordinarily not be enforced. *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), *reversing* 677 F.2d 211 (2d Cir.

1982).[6] Specifically, the Court framed the issue as whether a general accountant-client privilege should be created, rather than a work-product privilege linked (and limited) to the independent auditors' role in preserving the integrity of the financial markets by encouraging open communication between companies and their auditors. In 1984, the Court answered that question in the negative. Significant changes in federal securities laws and financial reporting since the Court's decision in *Arthur Young*, however, should prompt the Court to revisit that issue and to hold that tax accrual workpapers are

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[6] The appeals court in *Arthur Young* acknowledged that tax accrual workpapers may be potentially relevant within the meaning of section 7602 of the Internal Revenue Code (26 U.S.C. § 7602), but drew upon the Court's decision in *Hickman v. Taylor* to hold that public policy requires that a summons for such workpapers ordinarily not be enforced; accordingly, it fashioned a work-product privilege that, in the absence of fraud, would shield the documents from compelled disclosure. 677 F.2d at 220-21. Taking a different approach, the Tenth Circuit in *United States v. Coopers & Lybrand*, 550 F.2d 617 (10th Cir. 1977), held that a summons for such documents was not enforceable under section 7604 because those documents are not relevant to the taxpayer's tax liability. *Id.* at 619 (several factors must be weighed in deciding whether tax accrual workpapers are relevant, including the adverse effect might have on the interchange between taxpayers and its independent auditors and any resulting weakening of the securities law). *Accord United States v. Matras*, 487 F.2d 1271, 1275 (8th Cir. 1973) ("If we were to accede to the government's view [that the general need for a 'road map' was sufficient], it is difficult to imagine corporate materials that might not contribute to a more comprehensive understanding of the workings of the corporation, and thus, according to the government, be deemed relevant to the tax investigation."). In contrast, the Fifth Circuit in *United States v. El Paso Co.*, *supra*, refused to limit the IRS's summons power in respect of tax accrual workpapers.

protected by a separate work-product privilege for documents prepared in connection with the preparation of audited financial statements.

In reaching its decision in *Arthur Young*, the Court said that "absent unambiguous directions from Congress," 465 U.S. at 816 (*quoting United States v. Bisceglia*, 420 U.S. 141, 150 (1975)), it felt constrained not to shield tax accrual workpapers from disclosure. *Amicus* TEI respectfully suggests that "the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience," Fed. R. Evid. 501, support the Court's reexamination of the issue.

Corporate scandals in the first few years of the century involving Enron, WorldCom, and many other companies spotlighted the fragility of financial controls and the ease with which companies could conceal from financial statement auditors activities that threatened the viability of their enterprises and, indeed, the underlying integrity of the U.S. securities market. In the wake of these scandals, in order to restore investor and public confidence in the securities markets, Congress enacted the *Sarbanes-Oxley Act of 2002*, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.), which heightened public company financial controls, toughened penalties, and imposed new disclosure obligations. Congress did not, however, mandate either the creation or disclosure of tax accrual workpapers, even though a robust disclosure regime already exists in the Internal Revenue Code. *See e.g.*, 26 U.S.C. § 6662(b)(2)(B) (penalty for understatement

of tax reduced for items disclosed to the Internal Revenue Service).[7]

In addition, new and more demanding accounting rules on the calculation and reporting of tax assets and liabilities—including the calculation of contingent tax liabilities for purposes of establishing financial statement reserves—have come into force. Specifically, in 2006, the Financial Accounting Standards Board introduced a new standard for calculating "uncertain tax positions" that was designed to increase "relevance and comparability in financial reporting of income taxes by clarifying the way companies account for uncertainty in income tax assets and liabilities."[8] Under the new standard, public companies such as Textron here, must evaluate each tax position taken on their returns to determine whether those positions are supported by technical authority that, in the opinion of the company, would "more likely than not" be sustained by a taxing authority. This process often results in detailed written analyses of numerous tax issues including the likelihood of succeeding in litigation and the related mental impressions of tax professionals including both accountants and attorneys.

Finally, in 2002, the IRS issued Announcement 2002-63, 2002-2 C.B. 72, which mandated broader

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[7] The legislative history of 26 U.S.C. § 6662 expressly notes that in no event shall this provision "require the disclosure of accountant's work papers." S. Rep. No. 97-494, 94th Cong., 2d Sess. 274 (1982) (Report of Senate Committee on Finance).

[8] The accounting standards body issued FASB Interpretation No. 48, *Accounting for Uncertainty in Income Taxes*, on December 16, 2006. The interpretation is now codified in the FASB's ASC 740.

disclosure of tax accrual workpapers than required at the time of the Court's decision in *Arthur Young*.[9]

These developments since 1984 collectively place a premium on the assessment of tax risk and the calculation of financial reserves in respect of a company's tax position. They also place a premium on confidential communications between companies and their legal advisers in aid of that assessment. On the one hand, financial statement auditors are obligated to pinpoint potentially vulnerable areas of a company's tax returns, make inquiries into the company's legal analysis of those positions and its consideration of whether and how to litigate those issues if their reported treatment were challenged by the relevant tax authority, and document the review. On the other hand, if the IRS can freely seek access to a company's files in pursuit of a "blueprint" (as the court below put it) or in the course of a "fishing expedition" (such as explained in *Hickman*), the company might prepare less documentation for its positions or be less forthcoming in providing it to the

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[9] IRS Announcement 2002-63 significantly broadened the situations in which the IRS would seek access to tax accrual workpapers. In *Arthur Young*, the Court cited with approval the IRS's "administrative sensitivity" to "the intrusiveness of demands for the production of "tax accrual workpapers" in "tightening [of] its internal requirements for the issuance of summonses" for tax accrual workpapers. 465 U.S. at 820-21 & n.17. *See* Internal Revenue Manual § 4024.4 (1981) (access may be had to accountants' tax accrual workpapers only in "unusual circumstances"). The Court stated that the IRS's promulgation of its so-called policy of restraint refuted the taxpayer's argument that granting the IRS access to a roadmap of mental impressions was unfair. 465 U.S. at 821.

auditor, making it more difficult for the auditor to do its job.[10]

A careful balancing of different and sometimes competing interests is necessary in resolving the tax accrual workpaper disclosure issue—specifically, the government's interest "in the enforcement of its laws and collection of the revenue," *Couch v. United States*, 409 U.S. 322, 336 (1973), and the "national public interest, . . . [in] insur[ing] the maintenance of fair and honest markets in [securities] transactions," 15 U.S.C. § 78b (1976). Balancing those issues in 1984, this Court in *Arthur Young* found it unnecessary to fashion a work-product privilege to protect tax accrual workpapers. That determination is ripe for reconsideration in light of the intervening changes to the statutory and regulatory landscape applicable to the preparation and auditing of corporate financial statements.[11] At a minimum, the changing times

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[10] *See* Diss & Hanson, *Tax Contingency Audit Workpapers: 1981-1982 Developments, Observations and Proposals*, 14 Tax Adviser 154, 162 (March 1983) (if summonses for tax accrual workpapers are routinely enforced, "[c]orporations and auditors may be tempted to resort to the 'unwritten' expedient, the very result the Supreme Court wishes to prevent when it first announced the work-product privilege in *Hickman v. Taylor*."); Note, *Protecting the Auditor's Work Product from the IRS*, 1982 Duke L.J. 604, 616 (if auditor workpapers are not protected from disclosure, auditors could "change documentation procedures to ensure that the IRS could gain little from reviewing CPA audit workpapers").

[11] It was concern about policies underlying the securities law that led to the Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). In that case, the government argued that no privilege was necessary because there were independent reasons for the corporation to seek legal advice. The Court found, however, that, even assuming an investigation to ensure compliance were undertaken, "the depth and quality of any

reinforce the need to vivify the holding of *Hickman* by reversing the court below.

Amicus Tax Executives Institute respectfully submits that the different times require a different balance than that struck by the court below: The strong public interest in maintaining a high level of financial reporting—a public interest fortified by the corporate scandals in the past decade—outweighs the IRS's purported "need" for a roadmap of the arguments that a taxpayer may raise in defending certain positions in the event of an examination.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted

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investigations to ensure compliance with the law would suffer" unless the privilege were extended to those individuals in the corporation who had knowledge of the relevant information. 449 U.S. at 392-93 & n.2.